THE PROGRESS & FREEDOM FOUNDATION

Progress on Point

Volume 17, Issue 15 August 2010

The Seven Deadly Sins of Title II Reclassification (NOI Remix)

by Larry Downes

A great deal of ink has already been spilled over the FCC plans to "reclassify" broadband Internet Service Providers to subject them to the common carrier rules of Title II of the Communications Act. As I've written earlier,[1] the move is on extremely shaky legal grounds,[2] usurps the authority of Congress in ways that challenge fundamental Constitutional principles of agency law,[3] would cause serious harm to the Internet's vibrant ecosystem,[4] and would undermine the Commission's worthy goals in implementing the National Broadband Plan.[5]

No need to repeat any of these arguments here. Reclassification is wrong on the facts, and wrong on the law. But there's more. A close read of the "Framework for Broadband Internet Service" Notice of Inquiry [6] now being considered reveals some surprising and disturbing suggestions of an even broader regulatory agenda for the FCC. This paper reviews seven of the most worrisome of those surprises—the Seven Deadly Sins of Title II Reclassification.

How Did We Get Here?

That anything in the NOI would be surprising is itself a surprise. Both the Commission's legal counsel and Chairman Julius Genachowski had published comments over a month before its

---

Larry Downes is a Nonresident fellow at the Stanford Law School Center for Internet & Society. The views expressed here are his own, and are not necessarily the views of the PFF board, other fellows or staff.

1 Larry Downes, *FCC Votes for Reclassification, Dog Bites Man*, THE TECHNOLOGY LIBERATION FRONT, June 17, 2010, http://techliberation.com/2010/06/17/fcc-votes-for-reclassification-dog-bites-man/.

2 Larry Downes, *Reality Check: "Reclassifying" Broadband Would be Hard—Thank Goodness*, LARRYDOWNES.COM, Apr. 9, 2010, http://larrydownes.com/reality-check-%E2%80%9Creclassifying%E2%80%9D-broadband-would-be-hard%E2%80%94thank-goodness/.

3 Larry Downes, *Net Neutrality and the Inconvenient Constitution*, LARRYDOWNES.COM, May 5, 2010, http://larrydownes.com/net-neutrality-and-the-inconvenient-constitution/.

4 Larry Downes, *Net Neutrality Tail Wags Broadband Dog*, LARRYDOWNES.COM, Mar. 11, 2010, http://larrydownes.com/net-neutrality-tail-wags-broadband-dog/.

5 Larry Downes, *Albert Gallatin and the First National Broadband Plan*, LARRYDOWNES.COM, May 10, 2010, http://larrydownes.com/albert-gallatin-and-the-first-national-broadband-plan/.

6 FCC, Framework for Broadband Internet, *Notice of Inquiry*, June 17, 2010, http://hraunfoss.fcc.gov/edocs_public/Query.do?numberFld=10-114&numberFld2=&docket=&dateFld=06%2F17%2F2010&docTitleDesc= (hereinafter "NOI").

release that laid out the regulatory scheme the Commission now has in mind for broadband Internet access. So in some sense we thought we knew exactly what was coming.

In Chairman Genachowski's "Third Way" comments, the FCC head proposed a solution[7] he hoped would resolve the Net Neutrality jurisdiction problem left in the wake of the *Comcast v. FCC* decision a month before.[8] *Comcast* had rejected the Commission's often-tried and often-failed effort to treat "ancillary jurisdiction" under Title I of the Communications Act as a blank check to do whatever came to mind—in that case, sanctioning the cable company for violating the FCC's non-binding 2005 policy statement on net neutrality.[9]

Since the "Open Internet" Notice of Proposed Rulemaking (NPRM) had based its jurisdiction on the same "ancillary" foundation,[10] the *Comcast* case left the FCC in a bind: It was unlikely the D.C. Circuit would look more favorably on a net neutrality rulemaking than it had on a net neutrality adjudication, as both rested in the same jurisdictional quicksand. Following *Comcast*, the FCC was left with only a few options, none of them pleasant:

1. Refocus its ancillary jurisdiction argument, perhaps attaching it to some other provision of the Communications Act that hadn't been rejected by the D.C. Circuit.
2. Appeal the decision, either to an *en banc* sitting of the circuit court or to the U.S. Supreme Court or both. (Both options 1 and 2 would be discretionary appeals to the respective courts.)
3. Request legislation by Congress that would, one way or the other, undo *Comcast*.
4. "The nuclear option": Reverse a decade of FCC decisions interpreting the 1996 amendments to the Communications Act and classify broadband Internet access as a "telecommunications service" subject to the full regulatory powers of the Commission under Title II of the Act. Title II would give the FCC all the jurisdiction it needed and then some to continue with the NPRM, but at the cost of a radical extension of the agency's power over Internet access, power that the FCC itself had successfully argued to the U.S. Supreme Court and elsewhere that Congress had never intended to give it.[11]

---

7 Julius Genachowski, *The Third Way: A Narrowly Tailored Broadband Framework*, May 6, 2010, http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html.

8 *Comcast Corp. v. FCC*, 600 F. 3d 642 (D.C. Cir. 2010), available at http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf.

9 An earlier example, also unavailing, saw the FCC claiming "ancillary jurisdiction" as the basis for implementing the so-called "broadcast flag," ordering manufacturers of electronics devices to change their products to receive and follow codes sent by broadcasters indicating how their programming could be recorded to digital devices such as DVRs. *See American Library Association v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), available at http://openjurist.org/406/f3d/689/american-library-association-v-federal-communications-commission.

10 FCC, In the Matter of Preserving the Open Internet, Broadband Industry Practices, GN Docket 09-191, WC Docket 07-52, *Notice of Proposed Rulemaking*, Oct. 22, 2009 [hereinafter "NPRM"], http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-93A1.pdf.

11 *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) [hereinafter "Brand X"].

Chairman Genachowski, understandably unhappy with all of these options, developed what he called "The Third Way."[12] The FCC would abandon the "ancillary jurisdiction" argument, but at the same time would not go as far as some advocates urged by putting broadband Internet completely under the telephone rules of Title II.

Instead, the Commission would propose a "lite" version of Title II, based on a few guiding principles—from the Chairman's "Third Way" memo:

- Recognize the transmission component of broadband access service—and only this component—as a telecommunications service;
- Apply only a handful of provisions of Title II (Sections 201, 202, 208, 222, 254, and 255) that, prior to the *Comcast* decision, were widely believed to be within the Commission's purview for broadband;
- Simultaneously renounce—that is, "forbear from"—application of the many sections of the Communications Act that are unnecessary and inappropriate for broadband access service; and
- Put in place up-front forbearance and meaningful boundaries to guard against regulatory overreach. [13]

Unexpectedly, the NOI proposes two choices other than the "Third Way": stick with Title I and hope for a better court decision in the future, or to reclassify broadband and subject it to all of Title II. The FCC pretends not to take a position on which of them it should adopt. But it's clear that the Chairman and the two Democratic Commissioners who supported the NOI all prefer the "Third Way." The NOI asks for comments on all three choices, however, and for a range of extensions and exceptions to each.

I've written elsewhere about the dubious legal foundation on which the FCC rests its authority to change the definition of "telecommunications services" to suddenly include broadband Internet access—after successfully (and correctly) convincing the U.S. Supreme Court in 2005 that it did not.[14] That discussion will, it seems, have to wait until its next airing in federal court following inevitable litigation over whatever course the FCC takes now.

However that issue is resolved, a number of revelatory passages found their way into the NOI that deserve careful consideration. As if Title II weren't dangerous enough, there are hints and

---

[12] The Commission rejected outright the options to appeal *Comcast* or to go to Congress. So the two remaining options were to try again with Title I or to force fit broadband Internet access into Title II. Hence the "Third Way."

[13] Genachowski, *supra* note 7. Note from the start that "forbearance" may be a promise as ephemeral as the prairie breeze. See NOI, *supra* note 6 at ¶ 98 ("We seek comment on whether, if we forbore from applying those provisions of Title II that go beyond minimally intrusive Commission oversight, that decision would likely endure.").

[14] *See* Larry Downes, *Reality Check on 'Reclassifying' Broadband*, CNET NEWS.COM, April 19, 2010, http://news.cnet.com/8301-1035_3-20002842-94.html; Downes, *Net Neutrality and the Inconvenient Constitution, supra* note 3.

echoes throughout the NOI of regulatory dreams to come. Beyond the hubris of reclassification, here are seven surprises buried in the 116 paragraphs of the NOI—its seven deadly sins. In many cases the Commission is merely asking questions. But the questions hint at a much broader—indeed, overwhelming—regulatory agenda that goes beyond Net Neutrality and the FCC's attempt at reversal by fiat of the *Comcast* decision through reclassification.

Pride: The Folly of Defining "Internet Connectivity Service"

The goal of the Third Way is to apply reclassification only to the largest ISPs: Comcast, AT&T, Verizon, Time Warner, *etc*., leaving out smaller ISPs and those, such as EarthLink, who offer broadband Internet access but do not own or operate their own infrastructure facilities.[15] For facilities-based providers, the Commission would also like to separate basic Internet connectivity from any additional or enhanced services such as e-mail or website hosting.[16]

But the statutory definition of "telecommunications services," to which Title II applies, doesn't give them much help on either front.[17] So the NOI invents a new category, referred to as "Internet Connectivity Service (ICS),"[18] and suggests that reclassification under the Third Way would apply only to that category of service.

The NOI refers to ICS some thirty-seven times, but the Commission never provides a definition for this new regulatory classification. Initially, the NOI *describes* ICS as any service that "allows users to communicate with others who have Internet connections, send and receive content, and run applications online."[19] But what does that mean? Or, more to the point, what *doesn't*

---

[15] Genachowski, *supra* note 7 ("It will treat only the transmission component of broadband access service as a telecommunications service while preserving the longstanding consensus that the FCC should not regulate the Internet, including web-based services and applications, e-commerce sites, and online content.")

[16] That distinction would echo the long-standing (and equally artificial) separation in the old telephony world of "basic" and "enhanced" services. Prior to the divestiture of the old AT&T, basic services, essentially dial-tone and call connection, were subject to the full regulatory might of the FCC, while enhanced services, which increasingly came to mean data transmission, were left unregulated, largely because AT&T was forbidden from offering them directly. See Susan P. Crawford, *Transporting Communications*, 89 B.U. LAW REV. 871 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1254983.

[17] The term "telecommunications services," inherited from the 1984 AT&T consent decree, is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used."* 47 U.S.C. 153 (46). "Telecommunications," in turn, "means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id*. By contrast, "information services," the old "enhanced" service from the consent decree, is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." *Id*.

[18] NOI, *supra* note 6 ¶ 1 fn. 1

[19] *Id*.

that mean? Nearly every web application "allows users to communicate with others who have Internet connections," including hosted email, social networking, group collaboration tools, video and voice conferencing, bulletin boards, chat rooms and blogs, and instant messaging clients. Every website or web service "sends and receives content," and allows users to "run applications online."

So the definition can't be as broad as that. But what else is there to go on in parsing the FCC's intentions here? Some hint at what may be included in the missing definition of ICS comes from a review of the Commission's historical decisions to treat broadband Internet access under Title I. The Commission notes that as part of its argument for classifying broadband Internet access offered through cable modems as an "information service" under Title I (an argument affirmed by the *Brand X* case), it had defined something it called "Internet connectivity." [20]

That service was described as "establishing a physical connection to the Internet and interconnecting with the Internet backbone, and sometimes including protocol conversion, Internet Protocol (IP) address number assignment, domain name resolution through a domain name system (DNS)[21], network security, caching, network monitoring, capacity engineering and management, fault management, and troubleshooting."[22]

But if that is the definition the FCC has in mind for ICS, it too is frighteningly broad, encompassing a great deal more than just the "basic service" or "transmission component" or simply the "physical connection" of a provider's consumer offering.[23]

If that pre-*Brand X* definition of "Internet connectivity" is what the Commission has in mind for ICS, in fact, a range of providers and applications, including non-facilities based services, would either intentionally or otherwise fall into the Title II gap. For example:

- Amazon.com now provides basic web access through its Kindle e-book reader and its private Whispernet network. Most video game platforms, including Microsoft's Xbox 360, Sony's PlayStation 3 and Nintendo's Wii, likewise provide web browsing via the consumer's home network.[24]
- Many cloud computing purveyors, including those offering virtualization, application hosting, and other "infrastructure-as-a-service" companies include basic Internet access

---

[20] *Id*. at ¶ 16.

[21] The Domain Name System (DNS) acts as a "phone book" for the Internet, translating Internet addresses meaningful to people (e.g. pff.org) into the numerical IP address (e.g. 205.134.175.59) actually used by networking equipment.

[22] NOI, *supra* note 6 at ¶ 16.

[23] All terms the NOI uses more-or-less interchangeably while groping for a way to describe ICS. *See, e.g.*, *Id*. ¶¶ 12, 16, 106.

[24] Perhaps that's why Amazon in particular seems to have turned on the Third Way proposal, breaking with its colleagues in the Open Internet Coalition. *See* Paul Misener, *A Potential Net Neutrality Win-Win-Win*, CNET NEWS.COM, July 22, 2010, http://news.cnet.com/8301-13578_3-20011284-38.html.

as part of their offerings, sometimes using dedicated broadband connections they own or lease.[25]

- Other services, including Internet backbone provisioning, could also fall under Title II.[26] Would companies, such as Akamai, that offer private content caching services, suddenly find themselves subject to some or all of Title II?[27]
- How about Internet peering agreements (unmentioned in the NOI)? Would these private contracts be subject to Title II as well?
- And what of private content delivery networks? [28]

All of these services could plausibly be included in the loose terms and half-definitions the NOI throws around so casually, if not initially, then under later "refinements" to the class of providers included in ICS.

Maybe nothing so devious is in the FCC's mind. After all, the Chairman's Third Way memo makes clear that his plan is simply to limit Title II application to facilities-based ISPs and just to the most basic component—the physical connection—of their consumer offerings. All the FCC wants is "a commonsense definition of broadband Internet service,"[29] but they never provide it.

That's in part because the law they are trying to invoke doesn't make such distinctions.[30] So the broader the definition, the worse the Commission's chance its reclassification gambit will stand up to judicial scrutiny.

But make the definition too narrow and the battle is also lost. Consider a natural definition for ICS, for example, based on the architectural features of the OSI model.[31] If, by ICS, the NOI is

---

[25] *Cf*. NOI, *supra* note 6 at ¶ 107 ("For example, we do not intend to address in this proceeding the classification of information services such as e-mail hosting, web-based content and applications, voicemail, interactive menu services, video conferencing, cloud computing, or any other offering aside from broadband Internet service."). But compare *Id*. ¶¶ 10, 58 and 107.

[26] *Id*. at ¶ 64.

[27] *Id*. at ¶ 58.

[28] *Id*. at ¶ 107.

[29] *Id*.

[30] Again, compare the statutory definitions of "information services" and "telecommunications services," *supra* note 17. It bears repeating that the FCC is not working with a clean slate here, much as it would like to do so. Under some circumstances, courts give deference to agency interpretations of ambiguous aspects of the laws the agencies are charged with implementing, but that deference does not and cannot extend to rewriting ambiguous definitions. In that sense it's misleading even to talk of "reclassification." What the FCC is really proposing here is to change (radically) its interpretation of what the key definitions actually mean.

[31] The Open Systems Interconnection model (OSI model) "is a way of sub-dividing a communications system into smaller parts called layers. A layer is a collection of conceptually similar functions that provide services to the layer above it and receives services from the layer below it." Wikipedia, *OSI Model*, http://en.wikipedia.org/wiki/OSI_model (last accessed Aug. 17, 2010).

referring only to the lower layers, including the physical, data link and perhaps as far up as the network layer, the FCC's problem then becomes under- rather than over-inclusion.[32]

Why? Because applying Title II just to the lower layers of the OSI stack probably doesn't give the FCC the authority it needs to enforce the open Internet rules—the entire point of this exercise. The potential blocking and discriminatory behavior of some ISPs that inspired the NPRM and now the NOI is usually accomplished through network management techniques. But network management, good or evil, largely occurs well above the lower layers of the OSI model.[33]

Applying Title II more broadly based on a functional definition of "facilities-based" providers has the effect of including too much. It could, for example, unintentionally sweep in application providers who increasingly offer connectivity as a way to promote usage of their products. This applies to several companies offering cloud-based "infrastructure-as-a-service."

Limiting the scope of reclassification just to providers who sell directly to consumers also won't eliminate the risk of over-inclusion. Some application providers offer a physical connection in partnership with an ISP (think Yahoo and Covad DSL service) and many large application providers own a good deal of fiber optic cable that could be used to connect directly with consumers. (Think of Google's promise to build gigabit test-beds for select communities.[34])

Municipalities are also working to provide WiFi and WiMax connections, again in cooperation with existing ISPs. EarthLink planned several of these before running into financial and, in some cities, political trouble.[35]

So the real sin here is the potential for unintentional over-inclusion, under-inclusion, and possibly both. It is probably the most deadly sin the FCC commits in the NOI. Unfortunately, the collateral damage will likely fall in equal parts on consumers, network operators, and content and application providers.

Lust: The Lure of Privacy, Terrorism, Crime & Copyright

Though the express purpose of the NOI is to find a way to apply Title II to broadband, the Commission just can't help lusting after some additional powers it seems poised to claim for itself. Though the Commissioners who voted for the NOI have insisted that the goal of

---

[32] NOI, *supra* note 6 at ¶ 60 ("Some have suggested that the Commission should take account of the different network 'layers' that compose the Internet.").

[33] In the *Comcast* case, the *raison d'etre* for the NOI was that the cable provider was apparently blocking BitTorrent traffic above the network layer and certainly above the physical layer. See George Ou, *What Part of the Internet do you Want to Regulate?*, DIGITAL SOCIETY, May 17, 2010, http://www.digitalsociety.org/2010/05/what-part-of-the-internet-do-you-want-to-regulate/.

[34] *See* Google, *Google Fiber for Communities: Next Steps*, http://www.google.com/appserve/fiberrfi/ (last accessed Aug. 17, 2010).

[35] *See* Adam Thierer, *Philly Muni Wi-Fi Fiasco Continues; Taxpayers to Pick Up Tab*, PFF Blog, Dec. 17, 2009, http://blog.pff.org/archives/2009/12/philly_muni_wi-fi_fiasco_continues_taxpayers_to_pi.html.

reclassification is not to regulate "the Internet" but merely broadband access,[36] the siren song of regulatory intervention on other issues may prove impossible to resist.

Recognizing, for example, that the Federal Trade Commission has been holding roundtables all year on the problems of information privacy, the FCC now asks for comments about how it can use Title II authority to get into the game, promising of course, to "complement" whatever actions the FTC is planning to take.[37]

Cyber-attacks and other forms of terrorism are also on the Commission's mind. In his separate statement, for example, Chairman Genachowski argues that the *Comcast* decision "raises questions about the right framework for the Commission to help protect against cyber-attacks."[38]

Indeed, the NOI includes several references to homeland security and national defense[39]—this in the wake of publicity surrounding Sen. Lieberman's proposed law to give the President extensive emergency powers over the Internet.[40] Lieberman's bill puts the power squarely in the Department of Homeland Security—but is the FCC perhaps hoping to use Title II to capture some of that power for itself?

And beyond shocking acts of terrorism, does the FCC see Title II as a license to deputize ISPs to police other, lesser crimes, including copyright infringement, libel, bullying and cyberstalking, "e-personation"[41]—and the rest? Would Title II empower the agency to impose its content "decency" rules—limited today merely to broadcast television and radio--to Internet content, as Congress has unsuccessfully tried to help the Commission do on three separate occasions?[42]

Anger: Sharing the Pain of CALEA

That last paragraph is admittedly pure speculation: The NOI contains no references to copyright, Internet crime, or indecent content. But here's a law enforcement sin that isn't speculative. The NOI reminds us that separate from Title II, the FCC is required by law to

---

[36] Genachowski, *supra* note 7 ("the FCC should not regulate the Internet"); NOI, *supra* note 6 at ¶ 107.

[37] See NOI, *supra* note 6 at ¶¶ 39, 52, 82, 83, 96. Rep. Ed Markey, a strong net neutrality proponent, believes privacy protection online should be part of any legislative solution to the net neutrality problem. See Cecilia Kang, *Google-Verizon deal draws criticism from Democratic lawmakers*, THE WASHINGTON POST, Aug. 10, 2010, available at http://voices.washingtonpost.com/posttech/2010/08/google-verizon_deal_draw_criti.html.

[38] NOI, *supra* note 6 (Statement of Chairman Julius Genachowski).

[39] *See Id*. ¶¶ 41, 89.

[40] *See* Declan McCullaugh, *Lieberman Defends Emergency Net Authority Plan*, CNET NEWS.COM, June 15, 2010, http://news.cnet.com/8301-13578_3-20007851-38.html?tag=mncol.

[41] Larry Downes, *The Fallacy of "E-Personation" Laws*, THE TECHNOLOGY LIBERATION FRONT, June 11, 2010, http://techliberation.com/2010/06/11/the-fallacy-of-e-personation-laws/.

[42] *See* Robert Corn-Revere, The Progress & Freedom Foundation, *The First Amendment, the Internet & Net Neutrality: Be Careful What You Wish For*, Progress on Point 16.28, Dec. 2009, http://www.pff.org/issues-pubs/pops/2009/pop16.28-FCC-workshop-free-speech-net-neutrality.pdf.

enforce the Communications Assistance for Law Enforcement Act (CALEA).[43] CALEA is part of the rich tapestry of federal wiretap law, and requires "telecommunications carriers" to implement technical "back doors" that make it easier for federal law enforcement agencies to execute wiretapping orders.[44] Since 2005, the FCC has held that all facilities-based providers are subject to CALEA.

In the NOI, the Commission assumes that reclassification would do nothing to change the broader application of CALEA already in place, and seeks comment on "this analysis."[45] The Commission now wonders how CALEA impacts its forbearance decisions. But I have a different question: Assuming the definition of ICS providers is as muddled as it appears (see above), is the Commission intentionally or unintentionally extending the coverage of CALEA to anyone selling Internet "connectivity" to consumers, even those for whom that service is simply offered in the interest of promoting applications? Would CALEA, under the Third Way, apply to Amazon's Whispernet, to cloud-based infrastructure and virtualization providers, and/or to content delivery networks? Will residents of communities participating in Google's fiber optic test bed[46] awake to discover that all of that wonderful data they are now pumping through the fiber is subject to capture and analysis by any law enforcement officer holding a wiretap order? Oops!

Gluttony: The Insatiable Appetite of State and Local Regulators

Just when you think the worst is over, there's a nasty surprise waiting at the end of the NOI. Under Title II, the Commission reminds us, many aspects of telephone regulation are not exclusive to the FCC but are shared with state and even local regulatory agencies.

Fortunately, to avoid the catastrophic effects of imposing perhaps hundreds of different and conflicting regulatory schemes to broadband Internet access, the FCC has the authority to preempt state and local regulations that conflict with FCC "decisions," and to preempt the application by state and local regulators of those parts of Title II the FCC may or may not forbear.

But here's the multi-billion dollar question, which the NOI saves for the very last: "Under each of the three approaches, what would be the limits on the states' or localities' authority to impose requirements on broadband Internet service and broadband Internet connectivity service?" [47]

What indeed? One of the provisions the FCC would *not* apply under the Third Way, for example, is Section 253, which gives the Commission the authority to "preempt state regulations that

---

[43] NOI ¶ 89.

[44] Pub. L. No. 103-414, 108 Stat. 4279, codified at 47 USC §§ 1001-1010.

[45] NOI ¶ 89.

[46] Google, *supra* note 34.

[47] NOI ¶ 109.

prohibit the provision of telecommunications services."[48] So does the Third Way taketh federal authority only to giveth to state and local regulators? Is the only way to avoid state and local regulations—"Oh, well, if you insist!"—to go to full Title II? And might the FCC decide in any case to exercise their discretion, now or in the future, to allow local regulations of Internet connectivity?

What might such regulations look like? One need only review the history of local telephone service to recall the rate-setting labyrinths, taxes, micromanagement of facilities investment and deployment decisions—not to mention the scourge of corruption, graft and other government crimes that have long accompanied the franchise process.[49] Want to upgrade your cable service? Change your broadband provider? Please file the appropriate forms with your state or local utility commission and, please, be patient.

Fear-mongering? Well, consider a proposal approved this summer at the annual meeting of the National Association of Regulatory Utility Commissioners.[50] The Commissioners approved what they call a "fourth way" to fix the Net Neutrality problem, and are urging the FCC to adopt it. Their description of the fourth way speaks for itself. It would consist of:

> bi-jurisdictional regulatory oversight for broadband Internet connectivity service and broadband Internet service which recognizes the particular expertise of States in: managing front-line consumer education, protection and services programs; ensuring public safety; ensuring network service quality and reliability; collecting and mapping broadband service infrastructure and adoption data; designing and promoting broadband service availability and adoption programs; and implementing competitively neutral pole attachment, rights-of-way and tower siting rules and programs.

The proposal also asks the FCC, should it stick to the Third Way approach, to add in several other provisions left out of Chairman Genachowski's list, including one (again, § 253) that would preserve the states' ability to "help out."

Or consider a proposal currently being debated by the California Public Utilities Commission. California likewise wants to use reclassification as the key that unlocks the door to "cooperative federalism," and has its own list of provisions the FCC ought not to forbear from enforcing under the Third Way proposal.[51] Among other things, the CPUC's general counsel is unhappy with the definition the FCC proposes for just who and what would be covered by Title II

---

[48] NOI ¶ 87.

[49] Adam Thierer, *The Nonrevolution in Telecommunications and Technology Policy*, *in* THE REPUBLICAN REVOLUTION 10 YEARS LATER: SMALLER GOVERNMENT OR BUSINESS AS USUAL? 169 (Chris Edwards & John Samples, eds., Cato Institute 2005).

[50] National Association of Regulatory Utility Commissioners, *Draft Resolutions*, TC-1 at p. 30, July 15, 2010, http://summer.narucmeetings.org/2010ProposedResolutions.pdf.

[51] Gretchen Dumas, California Public Utilities Commission, *Filing of Comments in Response to FCC Notice of Inquiry*, July 6, 2010, http://docs.cpuc.ca.gov/PUBLISHED/REPORT/120246.htm.

reclassification. The CPUC proposal argues for a revised definition that "should be flexible enough to cover unforeseen technological [sic] in both the short- and long-term."[52] The CPUC also proposes that the FCC include under Title II providers of Voice over Internet Protocol (VoIP) telephony—often a software application riding well above the "transmission" component of broadband access.

California is just the first (tax-starved) state whose comments I looked for. I'm sure other states will (if they haven't already) respond hungrily to the Commission's invitation to "comment" on the appropriate role of state and local regulators under either a full or partial Title II regime.[53]

Sloth: The Sleeping Giant of Basic Web Functions: Browsers, DNS Lookup, *etc*.

The NOI admits that the FCC is a bit behind the times when it comes to technical expertise, and they would like commenters to help them build a fuller record. Specifically, the Commission asks for help "to develop a current record on the technical and functional characteristics of broadband Internet service, and whether those characteristics have changed materially in the last decade."[54] In particular, the NOI asks about the current state of web browsers, DNS lookup services,[55] web caching, and "other basic consumer Internet activities."

That sounds innocent enough, but these are very loaded questions. In the *Brand X* case, in which the U.S. Supreme Court agreed with the FCC that broadband Internet access over cable fit the definition of a Title I "information service" and not a Title II "telecommunications service," browsers, DNS lookup and other "basic consumer Internet activities" were crucial to the majority's analysis. Because cable (and later, it was decided, DSL) providers offered not simply a physical connection but also supporting or "enhanced" services to go with it—including DNS lookup, home pages, email support and the like—their offering to consumers was not simple common carriage and therefore not subject to Title II.

Justice Scalia disagreed, and in his dissent he made the argument that cable Internet was in fact two separable offerings: the physical connection (the packet-switched network) and a set of information services that ran on top of that connection. Consumers used some information services from the carrier, and some from other content providers (other web sites, etc.). Those information services were rightly left unregulated under Title I, but Congress intended the transmission component, according to Justice Scalia, to be treated as a common carrier "telecommunications service" under Title II.

The Third Way proposal in large part adopts Scalia's view of the Communications Act[56] even though the FCC argued vigorously against that view throughout the *Brand X* proceedings, and

---

52 *Id*.

53 *See* NOI ¶¶ 109, 110.

54 *Id*. ¶ 58.

55 *See supra* note 21.

56 *See*, *e.g.*, NOI ¶¶ 20, 106.

despite the fact that a majority of the Court agreed with it. The problem now, as noted above, is that defining just what is and is not part of that transmission component (what the NOI refers to as ICS) using any reasonable technical criteria would have the undesired effect of leaving out much of the network management activity the FCC wants to regulate.

By asking these innocent questions about technical architecture, the FCC appears to be hedging its bets for the inevitable court challenge. Any effort to reclassify broadband Internet access will generate long, complicated, and expensive litigation. What, the courts will ask, has driven the FCC to make such an abrupt change in its interpretation of terms like "information service" whose statutory definitions haven't changed since 1996?

Of course, the key change was not the "facts on the ground" but the leadership at the top: the current FCC Chairman simply wants to undo the *Comcast* decision, and thereafter complete the process of enrolling the open Internet rules proposed last October.[57] To do so, however, he must now overcome the settled law of *Brand X.* It would be very helpful to have evidence that the nature of the Internet and Internet access have fundamentally changed since *Brand X* was decided. If it's clear that basic Internet services have become more distinct from the underlying physical connection, at least in the eyes of consumers, separating ICS from the "information services" offered by ISPs may appear to be more rational than it did in 2005.

Or perhaps something bigger is lumbering lazily through the NOI. Perhaps the FCC is considering whether "basic Internet activities" (browsing, searching, caching, etc.) have now become part of the basic connectivity it includes in the undefined ICS, as they were once included in its definition of "Internet connectivity."[58] Perhaps Title II, in whole or in part, will apply not only to facilities-based providers, but to those who offer basic Internet services essential for Web access. (Why extend Title II to providers of "basic" information service? See below, "Greed.") If so, the exception (applying Title II only for ICS) will swallow the rule (limited application of Title II) and just about everything else that makes the Internet ecosystem work.

Vanity: The Fading Beauty of the Cellular Ingénue

Perhaps the most worrisome feature of the proposed open Internet rules is that they would apply with equal force to wired and wireless Internet access. But as any consumer knows, however, those two types of access couldn't be more different.[59]

Infrastructure providers have made enormous progress in innovating improvements to existing infrastructure—especially the cable and copper networks. New forms of access have also emerged, including fiber optic cable, satellite, Wi-Fi/WiMax, and the nascent provisioning of

---

[57] *See* NPRM, *supra* note 10.

[58] *See* NOI ¶ 16.

[59] A key difference between the NPRM and the proposed legislative framework developed by Google and Verizon is that the latter excludes wireless broadband Internet from the application of most neutrality principles. See Claire Cain Miller and Miguel Helft, *Web Plan from Google and Verizon is Criticized*, THE NEW YORK TIMES, August 10, 2010.

broadband over power lines, which has particular promise in remote areas with no other option for access.

Broadband speeds are increasing,[60] and there's every expectation that given current technology and private investment plans, the National Broadband Plan's goal of seeing 100 million Americans with access to 100 mbps Internet speeds by 2020 will be reached without any public spending.[61]

The wireless world, however, is a very different place. After years of underutilization of 3G networks by consumers who saw no compelling or "killer" apps worth using, the latest generation of portable computing devices (iPhone, Android, Blackberry, Windows, Palm) has reached the tipping point and gone well beyond. Existing networks in many locations are overcommitted, and political resistance to additional cell tower and other facilities deployment is exacerbating the problem.

Consider the growing tensions between cell phone providers and residents who want new towers located anywhere but near where they live, go to school, shop, or work.[62] For example, AT&T has complained that, while it takes only three weeks to get approval for a new tower in Texas, it takes three years to do so in San Francisco.[63] CTIA-The Wireless Association announced that it would no longer hold events in San Francisco after the city council, led by Mayor Gavin Newsome, passed a "Cell Phone Right to Know" ordinance that requires retail disclosure of a phone's specific adoption rate of emitted radiation.[64]

Given the relatively limited bandwidth of wireless Internet connections and the likely continued lagging of cellular deployments, it seems prudent to consider less stringent restrictions on network management for wireless than for wireline. Under the open Internet rules, providers would be unable to limit or ban outright certain high-bandwidth data services, notably video services and peer-to-peer file sharing, that the network may simply be unable to support (e.g.

---

60 Gary Kim, *U.S. Consumer Broadband Speeds Double Every Four Years*, TMCnet.com, Aug. 18, 2010, http://communication-solutions.tmcnet.com/topics/communication-solutions/articles/95639-us-consumer-broadband-speeds-double-every-four-years.htm. *Cf*. Frederic Lardinois, *Broadband Speeds Increase Around the World - But Not in the U.S.,* READWRITEWEB, Jan. 18, 2010, http://www.readwriteweb.com/archives/broadband_speeds_around_the_world.php.

61 Stacey Higginbotham, *What You Need To Know About the National Broadband Plan*, GIGAOM, Mar. 7, 2010, http://gigaom.com/2010/03/07/national-broadband-plan-will-be-a-day-early-but-fall-short/ ("The plan's most far-reaching goal is to deliver 100 Mbps to 100 million households by 2020. But as we've already pointed out, such a goal isn't really that ambitious given that 65 percent of homes in America will have broadband that could deliver 100 Mbps speed by the end of this year and 90 percent will have it by 2013.")

62 John Wildermuth, *Tension over Cellular Antennas Mount in City*, THE SAN FRANCISCO CHRONICLE, July 6, 2010, http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/07/06/BAT01E8QTQ.DTL.

63 Erica Ogg, *A reality check on Jobs' 3G network complaint*, CNET NEWS.COM, July 28, 2010, http://news.cnet.com/8301-31021_3-20011857-260.html.

64 Rachel Wimberly, *CTIA Leaves San Francisco in Wake of Cell Phone Labeling Ordinance*, TRADE SHOW NEWS NETWORK, June 26, 2010, http://www.tsnn.com/blog/?p=2489.

YouTube on airplane Wi-Fi networks). But the proposed open Internet rules will have none of that.[65]

The NOI does note some of the significant differences between wired and wireless, but also reminds us that the limited spectrum for wireless signals affords the agency special powers to regulate the business practices of providers.[66] Under Title III of the Communications Act, which applies to wireless, the FCC has and makes use of the power to ensure spectrum uses are serving a broad "public interest."[67]

In some ways, then, Title III gives the Commission powers to regulate wireless broadband access beyond what they would get from a reclassification to Title II. So even if the FCC were to leave the current classification scheme alone, wireless broadband providers might still be subject to open Internet rules under Title III. It would be ironic if the only broadband providers whose network management practices were to be scrutinized were those who most needed flexibility because their bandwidth is the most constrained. But irony is nothing new in communications law.

One power, however, might elude the FCC under Title III, and therefore give further weight to a scheme that would regulate wireless broadband under Title III and Title II. Title III does not include extension of Universal Service to wireless broadband. This is a particular concern given the increased reliance of under-served and at-risk communities on cellular technologies for all their communications needs.[68]

While the NOI asks for comment on whether, and to what extent, the FCC ought to treat wireless broadband differently and at a later time from wired services, the thrust of this section makes clear the Commission is thinking of *more*, not less, regulation for the struggling cellular industry.

Greed: Universal Service Taxes

So what about Universal Service? In an effort to justify the Title II reclassification as something more than just a fix to the *Comcast* case, the FCC has (with some hedging) suggested that the D.C. Circuit's ruling also calls into question the Commission's ability to use USF to subsidize broadband, a key recommendation of the National Broadband Plan published only a few weeks before the decision in *Comcast*.

At a conference sponsored by the Stanford Institute for Economic Policy Research that I attended, Chairman Genachowski was emphatic that nothing in *Comcast* constrained the FCC's ability to execute the plan.

---

65 *See* NPRM ¶¶ 5, 13.

66 *See* NOI ¶¶ 102, 103.

67 47 USC § 309(a).

68 Aaron Smith, Pew Internet & American Life Project, *Mobile Access 2010*, July 7, 2010, http://www.pewinternet.org/Reports/2010/Mobile-Access-2010.aspx.

But in the run-up to the NOI, the rhetoric has changed. Here the Chairman in his separate statement says only that "the recent court decision did not opine on the initiatives and policies that we have laid out transparently in the National Broadband Plan and elsewhere."[69]

Still, it's clear that, whether out of genuine concern or just for more political and legal cover, the Commission is trying to make the case that *Comcast* casts serious doubt on the Plan, and in particular the FCC's recommendations for reform of the Universal Service Fund (USF).[70]

Though the NOI politely recites the legal theories posed by several analysts for how USF reform could be done without any reclassification, the FCC is skeptical. For the first and only time in the NOI, the FCC asks not for general comments on its existing authority to reform Universal Service but for the kind of evidence that would be "needed to successfully defend against a legal challenge to implementation of the theory."[71]

There is, of course, a great deal at stake. The USF is fed by fees (essentially taxes) paid by consumers as part of their telephone bills, and is used to subsidize telephone service to those who cannot otherwise afford it or for remote areas where extending service is prohibitively expensive. Some part of the fund is also used for the "E-Rate" program, which subsidizes Internet access for schools and libraries.

Like other parts of the fund, E-Rate has been the subject of considerable corruption. As I noted in Law Four of my book *The Laws of Disruption*, a 2005 Congressional oversight committee labeled the then $2 billion E-Rate program, which had already spawned numerous criminal convictions for fraud, a disgrace, "completely [lacking] tangible measures of either effectiveness or impact."[72]

Today the USF collects $8 billion annually in consumer taxes, and there's little doubt that the money is not being spent in a particularly efficient or useful way.[73] The FCC is right to call for USF reform in the National Broadband Plan, and to propose repurposing the USF to subsidize basic broadband as well as telephone service. The needs for universal Internet access—employment, education, health care, government services, etc.—are obvious.

But what has this to do with Title II reclassification? There's no mention in the NOI of plans to extend the class of services or service providers obliged to collect the USF tax, which is to say there's nothing to suggest a new tax on Internet access. But the NBP encourages precisely that. Recommendation 8.10 recommends that Congress "broaden the USF contributions base" by

---

69 NOI (Statement of Chairman Julius Genachowski).

70 NOI ¶¶ 32-38.

71 *Id*. ¶ 38.

72 Larry Downes, THE LAWS OF DISRUPTION, Law Four (Basic Books 2010).

73 Cecilia Kang, *AT&T, Verizon get most federal aid for phone service*, THE WASHINGTON POST, July 8, 2010. *See also* James E. Dunstan, The Progress & Freedom Foundation, *The FCC's Title II 'Lite' (as a Lead Balloon!) & the Looming Broadband Tax*, Progress Snapshot 6.9, May 2010, http://www.pff.org/issues-pubs/ps/2010/ps6.9-title_II_lite.html.

finding some method of taxing broadband Internet customers.[74] (Congress has so far steadfastly resisted and preempted efforts to introduce any taxes on Internet access at the federal and state level.)

If Congress agreed with the FCC, broadband Internet access would someday be subject to taxes to help fund a reformed USF.[75] The bigger the category of providers included under Title II (the most likely collectors of such a tax), the bigger the USF. The temptation to broaden the definition of affected companies from "facilities based" to something, as the California Public Utilities Commission put it, more "flexible,"[76] would be tantalizing.

Conclusion

Reclassifying broadband Internet to apply common carrier rules designed for a telephone monopoly that has long since disappeared seems foolish enough on its own. Add these additional seven deadly sins to the mix, however, and the FCC has proposed perhaps the most dangerous expansion of federal power since the end of the Civil War.

Related PFF Publications

- *The FCC's Title II 'Lite' (as a Lead Balloon!) & the Looming Broadband Tax*, James E. Dunstan, Progress Snapshot 6.9, May 2010.
- *On Our Way to the Third Way: The FCC's Notice of Inquiry on Internet Regulation*, Charles H. Kennedy, Progress on Point 17.12, June 2010.
- *What Should the Next Communications Act Look Like?*, Adam Thierer, Link Hoewing, Walter McCormick, Peter Pitsch, Barbara Esbin, Ray Gifford, Michael Galabrese, Progress on Point 17.11, June 2010.
- *The Constructive Alternative to Net Neutrality Regulation and Title II Reclassification Wars*, Adam Thierer & Mike Wendy, Progress on Point 17.9, May 2010.
- *Ancillariness, the Definition Wars, and the Next Communications Act*, Barbara Esbin, Progress on Point 17.8, May 2010.
- *Jurisdiction: The $64,000 Question*, Barbara Esbin, Progress Snapshot 5.12, November 2009.
- *'The Law is Whatever the Nobles Do': Undue Process at the FCC (Executive Summary)*, Barbara Esbin, & Adam Marcus, Progress on Point 16.18, August 4, 2009.

---

[74] Federal Communications Commission, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, Mar. 16, 2010, http://download.broadband.gov/plan/national-broadband-plan.pdf.

[75] *See generally* Dunstan, *supra* note 73.

[76] Dumas, *supra* note 51.

The Progress & Freedom Foundation ■ 1444 Eye Street, NW ■ Suite 500 ■ Washington, DC 20005
202-289-8928 ■ mail@pff.org ■ @ProgressFreedom ■ www.pff.org